UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

OZBURN-HESSEY LOGISTICS, LLC	)	**Case No.: 26-CA-023497**
	)	**26-CA-023539**
and	)	**26-CA-023576**
	)	**26-CA-023675**
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS aka UNITED STEELWORKERS UNION	)	**26-CA-023734**

BRIEF OF RESPONDENT OZBURN-HESSEY LOGISTICS, LLC

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INTRODUCTION

Respondent Ozburn-Hessey Logistics, LLC[1] ("OHL") respectfully submits its Post-Hearing Brief regarding the Compliance Specifications and Notices of Hearing issued in consolidated Cases 26-CA-023497, 26-CA-023539, 26-CA-023576, 26-CA-023675, and 26-CA-023734. at issue in this case is a determination of the proper amounts of backpay owed to Carolyn Jones, Renal Dotson, Glorina Kurtycz, Jerry Smith, and Glenora Whitley[2]. As set forth herein, and as established by the evidence and testimony at the Trial, the General Counsel's Compliance Specifications failed to account for a number of factors with respect to each claim for backpay, and therefore the charging parties are not entitled to backpay in the amounts sought by the General Counsel.

FACTUAL AND LEGAL ARGUMENT[3]

I. Relevant Factual Background

The Compliance Specifications underlying this matter issued on April 29, 2016 (GC Ex. 1(c) and 1(h)) and requested backpay for five discriminatees on the basis of Board decisions issued separately on November 30, 2011 (GC Ex. 1(f); 357 NLRB No. 125 - Cases 26-CA-023675 and 26-CA-023734) and December 9, 2011 (GC Ex. 1(a); 357 NLRB No. 136 - Cases 26-CA-023497, 26-CA-023539, and 26-CA-0235). In the Compliance Specifications, the Board alleged the following facts:

[1] As of September 1, 2016, OHL changed its name to Geodis Logistics, LLC.

[2] During the pendency of these proceedings, Mrs. Whitley married, but the Board's documents still indicate her maiden name, Rayford. OHL will refer to Mrs. Whitley by her married name throughout this Brief.

[3] References to the trial transcript will be cited as "Tr. _____." References to the General Counsel's exhibits will be cited as "GC Ex. _____." References to the Respondent's exhibits will be cited as "R. Ex. _____."

A. Carolyn Jones

1. The backpay period for Ms. Jones covered a five (5) day suspension period sometime between August 30, 2009 and September 18, 2009 (GC Ex. 1(c), p. 2); and

2. According to the Board's calculations, Ms. Jones was due $792.76 in backpay, plus interest and excess tax liability. (GC Ex. 1(c), p.10). However, the parties stipulated at the Trial that she was due $502.96 in backpay, $132 in interest and excess tax liability of $16. (Tr. 7).

B. Renal Dotson

1. The backpay period for Mr. Dotson began on August 28, 2009 and ended on April 15, 2011 when he was reinstated (GC Ex. 1(c), p. 2); and

2. According to the Board's calculations, Mr. Dotson was due $33,816 in backpay, plus interest and excess tax liability. (GC Ex. 1(c), p.6).

C. Jerry Smith

1. The backpay period for Mr. Smith began on August 28, 2009 and ended on April 15, 2011 when he was reinstated (GC Ex. 1(c), p. 2); and

2. According to the Board's calculations, Mr. Smith was due $16,650 in backpay, plus interest and excess tax liability. (GC Ex. 1(c), p.9). However, General Counsel submitted a Revised Exhibit 4 during the Trial that recalculated Mr. Smith's backpay award to $8,383. (GC Rev. Ex. 4, p. 5).

D. Glorina Kurtycz

1. The backpay period for Mrs. Kurtycz began on March 2, 2010 and ended on April 15, 2011 when she was reinstated (GC Ex. 1(h), p. 2); and

2. According to the Board's calculations, Mrs. Kurtycz was due $22,854 in backpay, plus interest and excess tax liability. (GC Ex. 1(h), p.6). General Counsel submitted a Revised Exhibit at the Trial that deducted additional interim earnings from Mrs. Kurtycz's backpay calculation, bringing the total allegedly due to $17,672, exclusive of interest and excess tax liability. (GC Rev. Ex. 2).

E. Glenora Whitley

1. The backpay period for Mrs. Whitley began on November 18, 2009 and ended "around" December 31, 2011 (GC Ex. 1(h), p. 2); and

2. According to the Board's calculations, Mrs. Whitley was due $11,821 in backpay, plus interest and excess tax liability. (GC Ex. 1(h), p.7).

OHL answered the Compliance Specifications on May 20, 2016 (GC Exs. 1(e) and (1(j)). In its Answers, OHL denied that the Board had properly determined backpay because, among other things, it had failed to account for the reduction of certain overtime and double time; it had failed to reduce the amount owed for the discriminatees' failure to mitigate; and had failed to adjust for additional and/or misreported interim earnings. *Id*.

II. Legal Standard - Backpay and Mitigation Generally

In a backpay proceeding, the General Counsel must first show the amount of gross backpay due to each discriminatee. The respondent then has the burden of establishing affirmative defenses to mitigate its liability, including willful loss of interim earnings. *Millennium Maintenance & Electrical Contracting*, 344 NLRB 516, 573 (2004); *Chem Fab Corp.*, 275 NLRB 21 (1985), *enfd mem*. 774 F.2d 1169 (8th Cir. 1985). To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment. *Electrical Workers Local 3 (Fischbach & Moore)*, 315 NLRB 1266 (1995) (citing *Mastro Plastics*, 136 NLRB 1342 (1962), *enfd. in relevant part* 354 F.2d 170 (2d Cir. 1965), *cert. denied* 384 U.S. 972 (1996)). The discriminatee must put forth an honest, good-faith effort to find interim work. *Chem Fab Corp*., *supra*. The "sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the backpay period as a whole and not based on isolated portions of the backpay period." *Wright Electric, Inc.*, 334 NLRB 1031 (2001) (quoting *Electrical Workers Local 3 (Fischbach & Moore*), *supra*, *enfd*. 39 Fed. Appx. 476 (8th Cir. 2002). Further, according to the Board, the determination of a good-faith search is a fact-specific inquiry:

> [T]hat in broad terms a good-faith effort requires conduct consistent with an inclination to work and to be self-supporting and that such inclination is best

> evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the **sincerity and reasonableness** of the efforts made by an individual in his circumstances to relieve his unemployment.

Mastro Plastics, 136 NLRB at 1350 (emphasis added).

In *St. George Warehouse*, the Board clarified the framework for establishing that a discriminatee failed to make a reasonable search for work, stating that there are generally two elements: (1) there were substantially equivalent jobs within the relevant job market, and (2) the discriminatee unreasonably failed to apply for those jobs. 351 NLRB 961, 967 (2007). The Board further modified the legal standard to require that when the respondent meets its initial burden of coming forward with evidence that there were substantially equivalent jobs in the relevant geographic area available for the discriminatee during the backpay period, the burden then shifts to the General Counsel to produce competent evidence of the reasonableness of the discriminatee's job search. *Id*. As noted by the Board, this burden-shifting framework properly apportions burden to the discriminatee and General Counsel, who are in the best position to know of the discriminatee's attempts to mitigate his damages. *Id*. at. 965-66.

III. Charging Parties

A. Carolyn Jones

With respect to Carolyn Jones, the parties stipulated that the amount of backpay owed to Ms. Jones was $502.96. (Tr. 7). In addition, the parties stipulated that Ms. Jones was owed interest of $132 and excess tax liability of $16, for a total of $650.96.[4] *Id*. OHL reiterates its acceptance of this stipulation and therefore further discussion of Ms. Jones' backpay is unnecessary.

[4] OHL understands that the interest and excess tax calculation will be updated at the time of payment.

B. Renal Dotson

With respect to Renal Dotson, the testimony adduced at the Trial established that Mr. Dotson did not exercise reasonable diligence in searching for work. It is well settled that a discriminatee has a duty to make reasonable efforts to secure interim employment. NLRB Casehandling Manual, Part Three, Compliance Proceedings, ¶ 10558.1. The discriminatee's duty is to engage in "a reasonably diligent effort to obtain substantially equivalent employment." *Glenn's Trucking*, 344 NLRB 377 (2005).

Turning to the *St. George Warehouse* framework, OHL has met its initial burden by producing uncontroverted evidence that numerous jobs were available within the relevant job market. This evidence included classified ads during Mr. Dotson's backpay period, some months with multiple ads, and each ad containing open warehouse positions similar to Mr. Dotson's position with OHL. (R. Ex. 6). Further, OHL presented testimony from Ms. Lisa Johnson, OHL's Regional Human Resource Manager, regarding the abundance of warehouse jobs similar to Mr. Dotson's position during the backpay period. During Mr. Dotson's backpay period, Ms. Johnson was employed by Randstad, a recruiting staffing service, as a Senior Account Manager. (Tr. 241). Ms. Johnson testified that during the backpay period, she was placing approximately 100-150 warehouse workers per week in the Memphis metro area. (Tr. 242-43). Ms. Johnson further testified that during the backpay period, warehouses in the Memphis metro area were continuously hiring warehouse workers. (Tr. 244-45). In reviewing R. Ex. 6 at the Trial, Ms. Johnson identified similar open positions to Mr. Dotson's position at OHL throughout the backpay period. (Tr. 246-50). Thus, the burden then shifted to the General Counsel to produce competent evidence of the reasonableness of Mr. Dotson's job search. The General Counsel failed to meet its burden and Mr. Dotson should be denied backpay.

Mr. Dotson's job search efforts, as set forth in his reports to the Region, generally consisted of stopping in to various businesses to inquire whether work was available. (GC Ex. 3). Mr. Dotson testified that he was limited in his ability to job search due to where he was able to stay temporarily, as well as his ability to find transportation. (Tr. 165, 176, 179). Mr. Dotson further admitted that he did not apply for any warehouse positions during at least the first full month of the backpay period. (Tr. 163). Mr. Dotson did not obtain a single newspaper to check classified ads. (Tr. 186). He did not once visit a public library to search internet job boards. (Tr. 171). Instead, he lackadaisically visited businesses throughout the Memphis area at his leisure.

Taken as a whole, Mr. Dotson's entire job search efforts were simply unreasonable. First, Mr. Dotson's assertion that he was limited in his ability to travel to or locate work, thus limiting his job search efforts, should not be credited. Mr. Dotson admitted that he was a "responsible" person who could have obtained the use of his cousin's vehicle. (Tr. 179-80). If Mr. Dotson's reports to the Region are to be believed, he applied for positions all across Memphis, which again undercuts his argument that he was unable to find transportation or search for jobs outside of his immediate area. (GC Ex. 3). And Mr. Dotson likewise contradicted himself by asserting on the one hand that he barely had access to a phone, but his reports to the Region and his testimony indicate that he routinely called potential employers and kept telephone numbers to make calls. (Tr. 195-96; GC Ex. 3). But importantly, Mr. Dotson's explanations for several notable gaps in his job search efforts - that he was working on "get[ting] [himself] together as a person," that he was "[f]inding a place to stay or finding something to eat," and that he was "working on [his] hygiene" - simply fail to account for Mr. Dotson's willful idleness for days and months at a time. (Tr. 169-70, 175-76, 206-07).

Further to this point, a discriminatee generally must seek interim employment "substantially equivalent" to the position of which he or she was unlawfully deprived and that employment must be suitable to a person of like background and experience to the employee. *Grosvenor Orlando Associates, Ltd.*, 350 NLRB 1197, 1232 (2007). In this case, there is no evidence that Mr. Dotson ever attempted to locate substantially equivalent employment to what he held at OHL. In fact, Mr. Dotson's reports to the Region, if taken at face value, quite clearly indicate that he sought employment in auto detailing, landscaping, auto repair, and a number of other businesses, none of which were warehouse positions like the job he held at OHL. (GC Ex. 3). Mr. Dotson admitted that he did not apply to warehouse positions. (Tr. 163-64). Yet there was an abundance of warehouse jobs - indeed, forklift positions - throughout the Memphis metro area. (R. Ex. 6; Tr. 246-50). There is no explanation for why Mr. Dotson simply chose not to look for these substantially equivalent positions during the backpay period other than a willful effort to minimize his interim earnings. As set forth by the Board:

> The efforts a discriminatee is expected to make to get interim employment are those expected of reasonable persons in like circumstances. A variety of actions may demonstrate an effort to seek employment, including registering with state or private employment services, checking newspaper ads, visiting employers, utilizing online application resources, and asking friends and relatives.

NLRB Casehandling Manual, Part Three, Compliance Proceedings, ¶ 10558.3. It is not reasonable for the General Counsel to assert that Mr. Dotson could ignore substantially equivalent employers to OHL, or the warehouses that Mr. Dotson simply drove by without applying. Many of these warehouses were even on the same road as OHL's facility. (Tr. 164, 247). There is no explanation in the record for why Mr. Dotson did not seek positions like the position he held at OHL, or substantially equivalent employment, but instead chose to take a scattershot approach and apply at any random business he drove by.

A closer inspection of individual periods within Mr. Dotson's alleged job search efforts reveals even more support for denial of a backpay award. "A discriminatee is not due backpay for any period within the backpay period during which it is determined that he or she failed to make a reasonable effort to mitigate." NLRB Casehandling Manual, Part Three, Compliance Proceedings, ¶ 10558.1, n.123. Still, "[t]he entire backpay period must be scrutinized to determine whether throughout that period there was, in the light of all surrounding circumstances, a reasonable continuing search such as to foreclose a finding of willful loss." *Cornwell Co.*, 171 NLRB 342, 343 (1968). Mr. Dotson's testimony regarding specific periods of time during his job search illustrates these points quite clearly:

1. Mr. Dotson admitted that he did not apply for warehouse positions, particularly at any time during September of 2009, nor does the record support that he searched for substantially equivalent employment of like or similar position in a similar industry. (Tr. 164). The failure to search for substantially equivalent employment during the first two weeks after the discharge renders a discriminatee ineligible for backpay until he begins a good faith search. *Grosvenor*, 350 NLRB at 1201-02. As Mr. Dotson cannot show that any of his job inquiries or applications were for substantially equivalent employment, he is not entitled to backpay at all, but in any event, by his own admission he was not entitled to backpay during the month of September 2009.

2. Mr. Dotson explained that he only looked for work three days in October of 2009 because he was trying to "get [himself] together as a person." (Tr. 169). Mr. Dotson testified that this meant "trying to get back up and trying to keep my head positive while I go and find jobs and stuff, so I can get back a flow." (Tr. 169). He did not, however, explain how this excused his inquiries for positions on just three days of the month, with more than a week between each

inquiry. (GC Ex. 3, pp. 2-3). Further, it is difficult to fathom how the General Counsel could believe these efforts are reasonable, as Mr. Dotson's notes indicate that he was often told firms were not hiring, but nonetheless, he made no apparent effort to change the strategy or tactics of his job search. Thus, there is no evidence that he inquired or sought substantially equivalent employment during these inquiries.

3. Similarly, Mr. Dotson only inquired about positions three days in November of 2009. (GC Ex. 3, p. 3). Aside from the obvious issues with Mr. Dotson's diligence spending just three days inquiring about positions during the entire month, Mr. Dotson's credibility regarding the sincerity of these searches is questionable. For example, on November 4, 2009, Mr. Dotson claims to have inquired at PMG Staffing, Inc. at 3675 New Getwell Rd., Suite 10, Memphis, TN. *Id*. Two weeks later, Mr. Dotson inquired with A One Staffing at 3639 New Getwell Rd., Suite 1, Memphis, TN - next door to PMG Staffing.[5] *Id*. Then, Mr. Dotson claims, he applied with two companies at 4180 Getwell Rd., Memphis, TN, just one mile away from his prior two inquiries. *Id*. There is no justification for why Mr. Dotson waited so long between inquiries in the same area, or why he chose just these businesses to apply to. Mr. Dotson testified that when he wasn't looking for a job, he was "[f]inding a place to stay or finding something to eat." (Tr. 175). Given his sporadic job inquiries, it is unreasonable to believe that Mr. Dotson spent just a few minutes inquiring about jobs each month and the rest of his time trying to find food and shelter. These discrepancies suggest that Mr. Dotson was not serious about finding employment.

4. By his own admission, Mr. Dotson did not inquire about or apply for any positions between November 28, 2009 and January of 2010. (Tr. 178; GC Ex. 3, p. 3). January of 2010 was not much more active for Mr. Dotson, with just three days of activity, followed by no

[5] These addresses were entered into Google Maps, which is publicly available at maps.google.com.

job inquiries between January 27, 2010 and February 23, 2010. (Tr. 179; GC Ex. 3, pp. 3-4). The Board has held that an average of 1-2 job applications per month is insufficiently diligent, and has disallowed backpay during those periods. *Grosvenor*, 350 NLRB at 1201-1202. Here, these periods of inactivity illustrate Mr. Dotson's overarching approach to job searching, or more appropriately his approach to willful idleness. Regardless, Mr. Dotson certainly is not entitled to backpay during this period.

5. By his own admission, Mr. Dotson did not inquire about or apply for any positions between May 16, 2010 and July 18, 2010. (Tr. 178; GC Ex. 3, p. 3). As with the above period, Mr. Dotson, simply sat idle, and he is not entitled to backpay during this period.

6. By his own admission, Mr. Dotson inquired about just one position in November of 2010, two positions in December of 2010, and one position in January of 2011. (Tr. 187-89; GC Ex. 3, p. 9). Mr. Dotson applied for no more positions after January 18, 2011, up through April 15, 2011, when he was reinstated. (Tr. 189). Thus, from October 29, 2010, through April 15, 2011, Mr. Dotson inquired for no more than four positions, well below what the Board considers reasonable diligence. (Tr. 187-89).

The Board has directed that when mitigation is at issue, "[p]articular attention is appropriate for prolonged periods of unemployment." NLRB Casehandling Manual, Part Three, Compliance Proceedings, ¶ 10558.2. Such is the case here. While the facts clearly show that Mr. Dotson overtly acted in a manner inconsistent with his stated desire to obtain employment, each set of events also demonstrates a pattern in Mr. Dotson's approach to his job search. The common thread is that Mr. Dotson was not applying for jobs insofar as it appears he was simply walking into a randomly selected business on any given day and asking if there were any open

positions. These are not the actions of an individual who is serious about finding substantially equivalent employment.

The General Counsel cannot dispute that numerous positions for which Mr. Dotson was qualified were open throughout the backpay period. Without question, OHL has met its burden under the first prong of *St. George Warehouse*. The General Counsel further cannot dispute that Mr. Dotson did not apply for any warehouse/forklift positions, nor did he make any efforts to locate or identify firms with openings beyond a scattershot approach, spending no more than a few minutes on a few sporadic days over the course of more than a year and a half. Respectfully, Mr. Dotson's job search efforts throughout the entire backpay period were not reasonable. Mr. Dotson is not entitled to any backpay.

C. Jerry Smith

1. Mr. Smith misreported his interim earnings.

Mr. Smith's backpay award must be reduced for his failure to accurately report interim earnings. "In cases where it is established that a discriminatee has concealed interim earnings, it is Board policy to deny backpay for the period of concealment." NLRB Casehandling Manual, Part Three, Compliance Proceedings, ¶ 10558.1, n.105 (citing *American Navigation Co.*, 268 NLRB 426 (1983); *C. R. Adams Trucking*, 272 NLRB 1271, 1276 (1984); *see also Ad Art*, 280 NLRB 985 fn. 2 (1986)). "[T]he Board denie[s] backpay for the quarters a backpay claimant willfully concealed interim earnings." *Parts Depot, Inc.*, 348 NLRB 152, 153 (2006). Here, the record reflects that Mr. Smith submitted employment and expense reports to the Region during the backpay period. (Tr. 210; *see* GC Ex. 5). The record further reflects that there were discrepancies not only in the employers reported by Mr. Smith but also in the amounts reported by Mr. Smith to the Region during 2010. Specifically, Mr. Smith failed entirely to report to the

Region that he was employed by "Complete Facilities Maintenance" at some point in 2010. (Tr. 211-12). Mr. Smith's Social Security Administration Statement of Earnings provides that he earned $1,700.49 from "Complete Facilities Maintenance" during 2010, but this amount was not reported to the Board. (Tr. 211-12; GC Ex. 4, p. 4). Mr. Smith had no explanation for this failure to report his employment. *Id*. Since the Social Security Administration Statement of Earnings does not indicate in which quarter Mr. Smith worked for "Complete Facilities Maintenance," nor did he disclose that information during the Trial, Mr. Smith should, at a minimum, be denied backpay "for the period of concealment," or for the entire calendar year of 2010.

Further supporting a finding that Mr. Smith failed to disclose interim earnings is the Region's own testimony regarding discrepancies between Mr. Smith's Statement of Earnings and his quarterly reports to the Region. Ms. Warner admitted in her testimony that Mr. Smith had underreported his earnings to the Board in both the second and third quarters of 2010:[6]

> Q: So his actual earnings were over $1,000 -- in that quarter were over $1,000 more than what he reported to the Region on his employment and expense report. Is that right?
> A: Yes.
>
> . . .
>
> Q: So again, Mr. Smith underreported his income by over $1,000 in the third quarter of 2010. Is that right?
> A: The number I came up with using the 40 hours a week he said he worked was the 920. So that's the rate. Again he put down 37.72, but I wouldn't know the basis for why he put that. You'd have to ask him that.

(Tr. 80-81). Ms. Warner further admitted that she was unable to reconcile these discrepancies even after speaking to Mr. Smith:

[6] OHL respectfully maintains its objection to not being permitted to inquire fully into the quarterly discrepancies with either Ms. Warner (Tr. 81) or Mr. Smith (Tr. 218-20). Issues such as misrepresentation of earnings and mitigation are affirmative defenses for which OHL cannot obtain information or testimony outside of the Trial. Thus, OHL respectfully submits that it could have further developed the record on these issues if it had been permitted to question Mr. Smith and Ms. Warner further on the discrepancies in the calculations because their inability to explain the calculations is relevant to the willfulness of the underreporting..

Q: And were you able to reconcile those discrepancies?
A: No, because again he could not remember the dates in which he worked for the healthcare place or the extended care . . .

(Tr. 82). And further still, Mr. Smith offered no explanation for any of the significant unreported interim earnings:

Q: . . . For any instance when the NLRB concluded on Revised Exhibit 4 that you had interim earnings above what you reported in General Counsel Exhibit 5, would you have an explanation for that?
A: No, I don't.

(Tr. 221). In addition to the second and third quarters of 2010, Mr. Smith reported interim earnings of $3,776.29 and $3,604.63 in the fourth quarter of 2010 and the first quarter of 2011, respectively. (GC Ex. 5, pp. 6-7). Yet the Region determined that Mr. Smith had interim earnings of $5,510 in each of those two quarters - a difference of $1,773.71 and $1,905.37, respectively. (GC Rev. Ex. 4, p. 4). Put simply, Mr. Smith's concealment of no less than a quarter of his quarterly interim earnings for four consecutive quarters could only be willful, as he did not even attempt to justify his concealment.

Respectfully, per longstanding Board policy, Mr. Smith should be denied backpay during the quarters in which he concealed or failed to disclose interim earnings without justification. Here, Mr. Smith offered no explanation for his failure to disclose a substantial portion of his earnings during the backpay period. Indeed, the discrepancies are simply too much to ignore. Thus, his backpay calculation must be reduced by the net backpay assigned by the Region to the second ($1,119), third ($1,119), and fourth ($469) quarters of 2010, as well as the first quarter of 2011 ($469), for a total reduction of the General Counsel's net backpay calculation of $8,383 by $3,176, resulting in a corrected net backpay total of $5,207.[7] Further, since Mr. Smith did not

[7] OHL is not offering an alternative calculation, but rather referred to General Counsel's Revised Exhibit 4 and simply subtracted the pertinent quarters from General Counsel's total backpay calculation.

report his employment with "Complete Facilities Maintenance," which occurred at some time in 2010, it is impossible to determine during which quarter that particular nondisclosure occurred. Therefore, Mr. Smith should be further denied backpay for the first quarter of 2010, since the Board's policy is to deny backpay "for the period of concealment."[8] This results in a further reduction of Mr. Smith's net backpay award by $1,119, for a corrected net backpay amount of $4,088.

2. Mr. Smith's mitigation issues.

Finally, General Counsel failed to meet its burden of establishing the reasonableness of Mr. Smith's backpay calculation. *See generally Performance Friction Corp.*, 335 NLRB 1117 (2001). Specifically, Ms. Warner testified that Mr. Smith notified her that at some point in 2010, he voluntarily left a position, only to return at a lower rate of pay. (Tr. 71-73). It is Board policy that a respondent is entitled to an offset equal to what the employee would have earned but for an employee's decision to quit voluntarily. NLRB Casehandling Manual, Part Three, Compliance Proceedings, ¶ 10558.4, n.139 (citing *Grosvenor Resort*, 350 NLRB 1197, 1201 (2007)). Thus, for the Region to simply overlook Mr. Smith's voluntary actions, which resulted in lower interim earnings, is both unreasonable and against Board policy. OHL should be credited for the applicable difference in pay.

D. Glorina Kurtycz

There can be no question that Mrs. Kurtycz unreasonably failed to mitigate her damages, and thus she is not entitled to backpay for a substantial portion of the backpay period. Under the *St. George Warehouse* framework, OHL put forth evidence and testimony that numerous

[8] *See e.g. American Navigation*, 268 NLRB at 468, n.6 (the Board would "continue to deny all backpay to claimants whose intentionally concealed employment cannot be attributed to a specific quarter or quarters because of the claimant's deception.").

positions were available in the Memphis area for which Mrs. Kurtycz was qualified. (Tr. 245-47; R. Ex. 6). Since OHL presented evidence of substantially equivalent available positions, the burden shifts to the General Counsel to produce competent evidence of the reasonableness of the discriminatee's job search, which cannot be done here.

Specifically, Mrs. Kurtycz was discharged on March 2, 2010, the date from which the Region calculated the backpay period. (GC Ex. 1(a), p. 2). Yet she reported to the Region that her first attempt to locate work was not until a month later on April 2, 2010. (Tr. 115; GC Ex. 8, p. 1). Mrs. Kurtycz reported that did she not submit another application until April 31, 2010[9], and after that on May 4, 2010. (Tr. 115-16; GC Ex. 8, p. 1). She submitted just three applications in June of 2010. (Tr. 116; GC Ex. 8, p. 1). Then she submitted no other applications until she found work through Select Staffing on September 19, 2010.[10] (Tr. 116-18; GC Ex. 8, p. 2). The Region's witness could not explain this gap in Mrs. Kurtycz's employment, other than to testify to what Mrs. Kurtycz told her she would normally do during periods of unemployment. (Tr. 97-99).

The failure to search for substantially equivalent employment during the first two weeks after the discharge renders a discriminatee ineligible for backpay until she begins a good faith search. *Grosvenor*, 350 NLRB at 1201-02. Mrs. Kurtycz did not begin her search for a month after her discharge. In addition, one or two job applications a month is not sufficient diligence to be considered a reasonable and good-faith search for employment. *Id*. Here, Mrs. Kurtycz submitted just six applications from March 2, 2010 through September 19, 2010, more than six months. This is plainly insufficient to satisfy the General Counsel's burden of establishing the

[9] OHL assumes this is merely a transcription error, as April only has 30 days in any given year.

[10] OHL recognizes that Ms. Kurtycz testified generally that she was searching for work during this period, but she was unable to testify with specificity regarding any applications during this period, and she could offer no explanation for her reporting of some job inquiries but not others.

reasonableness of Mrs. Kurtycz's job search. Mrs. Kurtycz is therefore ineligible to receive backpay for, at a minimum, the period from March 2, 2010 through September 19, 2010, which period encompasses $12,782[11] of the total backpay sought in the Compliance Specification. Respectfully, Mrs. Kurtycz's backpay total should be reduced by that amount to $4,890.

E. Glenora Whitley

In the Compliance Specification, the Region determined that the backpay period for Mrs. Whitley began on November 18, 2009 and ended "around" December 31, 2011 (GC Ex. 1(h), p. 2). While the General Counsel is allowed discretion in choosing a formula for computing backpay, it is the General Counsel's burden to establish that the purported gross backpay amounts are reasonable and not arbitrary. *Performance Friction Corp.*, 335 NLRB at 1117. Here, the General Counsel's determination that the backpay period for Mrs. Whitley should end "around" December 31, 2011 is both inexact and arbitrary. The Region's witness testified that this date was chosen because the Board's underlying decision issued in November 2011 and Mrs. Whitley would be presumed to have notice of it, and because Mrs. Whitley stopped asking for overtime around 2012. (Tr. 55). However, this determination is arbitrary, as it ignores the clear evidence of prior notice to Mrs. Whitley.

First, Mrs. Whitley admitted in her testimony that she was aware of the federal court's April 5, 2011 10(j) order as it was posted on the breakroom wall in her assigned work location (WaterPik), although she denied understanding that it stated she could return to working overtime in the Remington account. (Tr. 302). It is unfair and baseless to hold Mrs. Whitley's failure to read or comprehend the order against OHL. She chose not to read the order, which was

[11] As with Mr. Smith, supra, OHL referred to General Counsel Revised Exhibit 2 and manually totaled the General Counsel's net backpay calculations from the beginning of the backpay period through September 19, 2010. The partial first quarter 2010 net backpay totaled $1,609; the full second quarter totaled $5,810; and the partial third quarter (through the week ending September 18, 2010) totaled $5,363. These periods together equal $12,782.

publicly posted. But second, OHL took affirmative measures to send notice to Mrs. Whitley, including specifically a letter dated April 11, 2011, notifying Mrs. Whitley of her right to seek overtime in the Remington account and directing her to notify Ms. Evangelia Young of her desire to work. (Tr. 317-18; R. Ex. 5). The letter was sent by FedEx delivery with signature required. (Tr. 317-19; R. Ex. 5). It was delivered to Mrs. Whitley's correct address, later confirmed correct by Mrs. Whitley, on April 13, 2011. (Tr. 318; R. Ex. 1). According to the FedEx receipt, the letter was signed for by an "R WHITNEY." (R. Ex. 1). OHL attested to the sending and delivery of the letter to Mrs. Whitley in a federal court filing dated April 22, 2011. (R. Ex. 5). The General Counsel did not object to that filing. (Tr. 83).

Still, Mrs. Whitley claims that she did not receive the letter. (Tr. 298). While OHL need not rely on a presumption of delivery, the factors are nonetheless met here. "Federal common law follows the so-called 'mail box rule' which provides that the proper and timely mailing of a document gives rise to a rebuttable presumption that the document has been received by the addressee in the usual time." *San Juan Teachers Association*, 355 NLRB 172, 175 (2010). Ms. Young testified that she personally prepared Mrs. Whitley's letter and prepared the letters for shipment with the assistance of another OHL employee. (Tr. 317-18). Further, Ms. Young personally verified that the letter had been delivered to Mrs. Whitley's address. (Tr. 318). The FedEx delivery confirmation indicates it was signed for by an "R WHITNEY." (R. Ex. 1). Admittedly, Mrs. Whitley's last name is "Whitley," not "Whitney," but it seems far more likely that there was a transcription error by FedEx than that the letter was delivered incorrectly. Indeed, Mrs. Whitley testified that her husband's name is "Archie Whitley," which could have easily been written wrong or copied incorrectly as "R WHITNEY" by FedEx.

OHL made great efforts to comply with the federal court order and more importantly, to accommodate Mrs. Whitley by notifying her that she could work overtime in the Remington account. Mrs. Whitley's self-serving assertion that she had no notice of the order or her rights, despite all the evidence to the contrary, should not be credited. Ultimately, since Mrs. Whitley did not avail herself of overtime opportunities after she was made aware of her right to do so, it should be assumed that she chose to voluntarily forego overtime, and OHL cannot be required to pay backpay beyond, at the latest, April 13, 2011, or the date its letter was delivered at Mrs. Whitley's residence. Ms. Warner agreed at Trial that receipt of the letter would cut off backpay. (Tr. 86). This adjustment would reduce Mrs. Whitley's backpay by $4,116.[12]

In addition, despite the General Counsel's representation, Mrs. Whitley's backpay calculation is arbitrary for still another reason. The Compliance Specification asserted that Mrs. Whitley's backpay calculation included a full weekend of overtime in the Remington account per month, asserting that OHL had failed to supply sufficient records to calculate backpay by any other means. (GC Ex. 1(h), p. 6). OHL answered the Compliance Specification and asserted that Mrs. Whitley did not work a full weekend of overtime in the Remington account each month, but could not otherwise address that contention because the Region could not even intelligibly demonstrate how it came to its conclusion. (GC Ex. 1(j), p. 3).

Of course, it is the General Counsel's burden to establish in the first instance that the backpay calculations are reasonable and not arbitrary. Yet here the Compliance Specification

[12] Pursuant to Exhibit 4 to the Compliance Specification (GC Ex. 1(h)), the General Counsel calculated Mrs. Whitley's quarterly backpay at $1,372 per quarter. Properly ending the backpay period on April 13, 2011, the third and fourth quarters of 2011 should be removed entirely from the calculation for a reduction of $2,744. The second quarter should also be removed entirely for an additional reduction of $1,372, even though the corrected backpay period ran into a partial month during that quarter. Ms. Warner testified that the figures were calculated assuming that overtime occurred "at the end of the month," and therefore Mrs. Whitley would not have earned any time as of April 13, 2011, using the General Counsel's assumptions. (Tr. 66). The total reduction for this period is $4,116. Once again, OHL is not using alternate calculations, but rather setting forth the basis for reductions based on its defenses using the General Counsel's figures.

acknowledged that it made assumptions without supporting evidence, and so did Ms. Warner in her testimony on behalf of the Region. Ms. Warner acknowledged that she had assumed that Mrs. Whitley would have worked one weekend of overtime in the Remington account every month, despite the fact that Mrs. Whitley had only ever worked one weekend at Remington, and despite the fact that the only time records in Ms. Warner's possession for comparators - Alvin Fitzgerald, Wanda Staples, and Alfred Stewart - showed that those individuals had weekend overtime hours in Remington on just three cumulative days between November 1, 2009 and May 21, 2010. (Tr. 94; GC Ex. 11).

Indeed, the time reports for Mrs. Whitley, which were reviewed by the General Counsel, directly undermine these assumptions for several important reasons. (GC Ex. 10). Those records showed first that out of the months covered (from August 11, 2009 through July 2, 2010), Mrs. Whitley worked only a single weekend of overtime. (Tr. 87; GC Ex. 10). Even assuming that she was denied overtime beginning November 18, 2009, the time records still cover the months of August, September, October, and November of 2009 - and Mrs. Whitley only worked overtime one weekend of one month, September. *Id*. Thus, the status quo at the time of the November 18, 2009 conversation beginning the backpay period was that Mrs. Whitley was not receiving any weekend overtime pay. (Tr. 90). It is unquestionably unreasonable for the General Counsel to assume a premise entirely contradictory to the known status quo at the time of the alleged discrimination.

Further, Ms. Warner essentially rejected the more reasonable possibility that weekend overtime was not available every month, instead choosing to assume, without any supporting evidence, that Fitzgerald, Staples, and Stewart had simply chosen not to work on weekends. (Tr. 94-95). In so doing, Ms. Warner necessarily rejected the fact that Mrs. Whitley did not work any

weekend overtime in October of 2009 (the month before the alleged unfair labor practice), which in and of itself establishes the unreasonableness of the General Counsel's position. It is beyond incredible that Ms. Warner would make such a blatantly unsupported conclusion when the evidence in her possession directly contradicted it. The General Counsel's position has no basis in fact or law. Since the General Counsel had no reasonable basis to include a calculation related to weekend overtime pay, weekends should be removed entirely from the calculation, resulting in a total of $3,027.80[13] over the General Counsel's proposed backpay period, but adjusting the backpay period to properly reflect an April 13, 2011 cutoff date would further reduce backpay to $1,955.60[14]. (Exs. 3 and 4 to GC Ex. 1(h)).

OHL submitted evidence at the Trial that demonstrated that the assumption underlying the General Counsel's calculation of Mrs. Whitley's backpay was flawed. Specifically, OHL submitted ninety-six (96) individual weekly billing reports for the Remington account that show generally when a non-Remington employee worked overtime in that account during the backpay period and beyond. (R. Ex. 8). In order to locate non-Remington employees working voluntary overtime, all that is necessary is to locate employees with no entries or low hourly totals in the "Reg. Hours" column but with overtime reported in the "OT Hours" column. (Tr. 256, 267, 269). Of these ninety-six weekly billing reports, only approximately eleven (11) indicate that non-Remington employees worked overtime on the Remington account (R. Ex. 8, pp. 14, 19, 21, 34, 40, 41, 45, 57, 59, 64, 75). In other words, the reports directly rebut the General Counsel's baseless assumption that overtime would have been available to Mrs. Whitley one full weekend

[13] Exhibit 3 to the Compliance Specification (GC Ex. 1(h)) indicates that the Region calculated $338.20 of weekend overtime pay per month. Exhibit 4 to the Compliance Specification calculated 26 months of overtime pay, for a total of $8,793.20 of the backpay calculation attributable to weekend overtime. Subtracting from the total backpay calculation of $11,821 leads to a corrected total $3,027.80.

[14] Removing weekend overtime at a rate of $338.20 per month from the General Counsel's quarterly calculations of $1,372 per quarter results in a corrected quarterly total of $357.40. Removing the second, third, and fourth quarters of 2011 ($1,072.20) results in a corrected total of $1,955.60.

of every month. Taken together with the remaining evidence in the General Counsel's possession, including Mrs. Whitley's time records and the time records of comparators, it is quite clear that the General Counsel was unjustified in assuming that Mrs. Whitley would have been able to work a full weekend of overtime every month. However, OHL recognizes that Mrs. Whitley likely would have worked some weekend overtime, but a more reasonable assumption would be that she might work weekend overtime every six months or every other quarter. General Counsel calculated weekend overtime pay for Mrs. Whitley at $338.20. (Exs. 3 and 4 to GC Ex. 1(h)). Thus, including three full weekends of overtime pay through the April 13, 2011 cutoff date results in a total of $2,970.20[15].

Finally, to briefly address the General Counsel's objection to the introduction of Respondent's Exhibit 8 on the basis of NLRB Rule and Regulation 102.56, OHL notes several important points. First, OHL again asserts that its Answer to the Compliance Specification complies with Rule 102.56(b), but OHL cannot be expected to provide alternate figures for an assumption for which the General Counsel's own witness could provide no justification in fact. It is the General Counsel's burden to establish that its backpay calculations and premises are reasonable. Further to this point, Rule 102.56(c) specifies the effect of a failure to set forth alternative figures where those failures are "not adequately explained." NLRB Rule and Regulation 102.56(c). In other words, read together, Rule 102.56(c) provides that the failure to set forth the alternative figures anticipated by Rule 102.56(b) *may* result in facts being deemed admitted or a respondent being precluded from introducing evidence, unless the failure is adequately explained. Here, OHL has several explanations for the lack of alternative figures in its Answer, each of which are more than adequate.

[15] This is the total of three weekends at $338.20 per weekend ($1,014.60) and the corrected total of $1,955.60, *supra*.

As an initial matter, OHL does not bear the burden of establishing reasonable backpay amounts. That is the General Counsel's burden, and where the General Counsel has only offered arbitrary support for its position, OHL is not obligated to create a supporting calculation for the General Counsel's premises. The General Counsel could not even justify these assumptions. Further, OHL did not learn of the records in Respondent's Exhibit 8 until the week before the Trial. But importantly, the General Counsel was not prejudiced or surprised by OHL's introduction of Respondent's Exhibit 8, because OHL in its Answer put the General Counsel on clear notice that OHL challenged the arbitrary basis of the assumption that Mrs. Whitley was entitled to a full weekend of overtime each month. (GC. Ex. 1(j), p. 3) ("OHL denies that Ms. Rayford worked a full weekend of overtime in the Remington account each month;" "the calculations in Exhibit 3 do not account for monthly differences in the amount of overtime worked, and because not even the NLRB Compliance offer could explain how she arrived at the monthly calculation;" "the calculation in Exhibit 4 is based on a monthly amount of overtime that not even the NLRB could explain how it derived, because the monthly overtime includes two full weekend days per month and fails to account for monthly differences . . ."). To hold that these are not adequate explanations would work a substantial injustice on OHL in the form of denial of due process and result in a windfall to Mrs. Whitley.[16]

CONCLUSION

In Conclusion, OHL respectfully requests that the honorable Administrative Law Judge find that the General Counsel's position with respect to backpay in the Compliance Specifications is not reasonable, and more specifically find as follows:

[16] OHL further summits that the alternate calculation requirement in Rule 102.56 predates the Board's application of daily compound interest and excess tax liability to backpay calculations, and these technical additions to the backpay calculation make it virtually impossible for the Respondent to perform an accurate alternate calculation.

1. That the parties have stipulated as the amount of backpay, interest, and excess tax liability owed to Carolyn Jones, which amounts include $502.96 in backpay, $132 in interest and excess tax liability of $16 (which OHL understands will be updated for current interest and excess tax liability calculations at the time of payment).

2. That Renal Dotson failed to engage in reasonable efforts to obtain interim employment and therefore is not entitled to an award of backpay. In the alternative, OHL requests that the Judge find that, at a minimum, Mr. Dotson is not entitled to backpay during the specific periods set forth above and deduct backpay accordingly.

3. That Jerry Smith misreported or concealed his earnings to the Board, and is therefore not entitled to backpay during any quarter in 2010 or in the first quarter of 2011, thereby reducing the amount of backpay to $4,088. In addition, OHL requests that the Judge find that the General Counsel unreasonably failed to consider Mr. Smith's voluntary decision to leave and later resume employment, resulting in a decreased rate of pay.

4. That Glorina Kurtycz unreasonably failed to mitigate her damages by failing to engage in reasonable efforts to secure interim employment from March 2, 2010 through September 19, 2010, decreasing her backpay by $12,782 to a total of $4,890.

5. That Glenora Whitley's appropriate backpay period, if any there may be, should properly be cut off on April 13, 2011, the date she received a letter from OHL regarding her right to seek overtime in the Remington account. This adjustment would reduce Mrs. Whitley's backpay by $4,116 to $7,705. Further, using the adjusted April 13, 2011 cutoff date and appropriately removing the General Counsel's erroneous inclusion of weekend overtime, the correct backpay total is $1,955.60 with no weekend overtime included, or $2,970.20 including an additional and far more reasonable three weekends of overtime pay.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2016, the foregoing *Brief* was sent by email and by U.S. mail, postage prepaid, to:

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